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 EMPLOYMENT SECURITY ADMINISTRATION
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REMAND FROM COURT OF DECISION NO. 55-EA-79
 REOPENED CASE

DECISION

IN THE MATTER OF THE APPEAL OF:

Georgetown Preparatory School

Decision No.: 10-EA-82

Date: October 14, 1982

Exec. Determ. No.: 2464

Emp. Account No.:

ISSUE: Whether services performed for Georgetown Preparatory School are services in covered employment within the meaning of 26 U.S.C., Section 3309(b)(1) and Section 20(g)(7)(v)B of Article 95A, the Maryland Unemployment Insurance Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY, IN THE SUPERIOR COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU DO BUSINESS.

THE PERIOD FOR FILING AN APPEAL TO COURT EXPIRES November 13, 1982

APPEARANCES

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 Sister Margaret Mary Modde
 Aloysius Galvin, S.J.
 Sister Kateri Peake
 Brother Peter Campbell

For the Executive Director:

John Zen -
 Legal Counsel

INTRODUCTION

This case was remanded to the Board of Appeals from the Court of Appeals of Maryland. In Employment Security Administration v. Baltimore Lutheran High School Association, Inc., et. al., 291 Md. 0 (1981), the Court of Appeals affirmed in part and vacated and remanded in part a previous decision of the Board (55-EA-79) which dealt with several church-related schools. The issue in each case was whether the school in question was exempt from unemployment insurance taxes (and, as a corollary, whether the employees of these institutions are covered by unemployment insurance) under Section 20(g)(7)(v)B of Article 95A, the Maryland Unemployment Insurance Law, and 26 U.S.C. Section 3309(B)(1)(A) and (B), part of the Federal Unemployment Tax Act.

The Court of Appeals has ruled that the Beth Tfiloh Day School, the Liberty Jewish Center and the Catholic Diocesan Schools in the Archdiocese of Washington are exempted from coverage under 26 U.S.C. Section 3309 (b) (1) (A) . The Court, however, remanded the other cases dealt with in that decision because the facts were insufficiently developed as to each individual school.

On remand, the Board will deal with each school individually, as the nature of the remand order from the Court of Appeals, which calls for specific and detailed findings of fact and new conclusions of law concerning each school, requires such individual treatment. This case has therefore been renumbered as Employer Account number 659030-O(G), as it deals only with Georgetown Preparatory School.

In making its findings in this case, the Board has considered the record (including the transcript) of the first hearing held before the Board in this case as well as the record made at the additional hearing held on June 29, 1982. Georgetown Preparatory School, in a request for admission of facts filed on June 28, 1982, requested that the Agency stipulate to nine admissions of fact. Stipulations have been reached in regard to facts numbered 3 and 5 on that document.

The Board appreciates the efforts to stipulate made by counsel for both the Agency and Georgetown Preparatory School.

FINDINGS OF FACT

Georgetown Preparatory School (hereinafter, "Georgetown") began operations as an educational institution for young men in 1789. At all times relevant to this case, it has functioned as a private, secondary, Catholic school. Its stated purpose is to provide a Christian learning environment, professing the teachings and principles of the Roman Catholic Church, for the purpose of providing an education aimed "at the formation of the human person, both with respect to his ultimate goal and at the same time with respect to the good of those societies which, as a human being, he is a member and whose responsibilities he will, as an adult, have a share." The corporation which owns the school has, as its purpose "the maintenance of an independent school under the auspices of the Society of Jesus for the mental, moral and physical training of youth, and education in the liberal arts and sciences."

The Society of Jesus was formed in 1540 as an order within the Roman Catholic Church. An order is a group of members of the Roman Catholic Church who, with the permission and authority of the regular church officials within the hierarchy, have associated themselves for some moral purpose which substantially consumes their full time efforts. The Society of Jesus has, a line of authority extending to the Roman Catholic Pope in Rome. This line of authority is parallel to the hierarchal line of authority from the Archbishop of Washington to the Pope.

The Archbishop of Washington has the ultimate ecclesiastical authority over activities that take place within the Archdiocese of Washington, but he exercises no actual supervision over the activities of the Society of Jesus, at least as far as the conduct of Georgetown is concerned.

Georgetown is run by a non-profit Maryland corporation formed in 1927. The charter of the corporation was extensively amended in 1972. The corporation is governed by four Members, each of whom serves for life or until he no longer meets the criteria for membership. A vacancy existing among the Members is filled by an election by the majority of the remaining Members. Each Member must be a member of the Society of Jesus, must be between 25 and 65 years of age and must be currently assigned to the Society of Jesus community attached to Georgetown.

The Members of the corporation elect a Board of Trustees, which in turn appoints the administrative officers of the school.

Sixty-six percent of the school finances are supplied by tuition and fees. The rest of the funds are supplied by gifts from alumni, friends and corporations, personal contributions, and support from the Society of Jesus. The breakdown of this remaining 3477 is not shown by the facts in the record.

The school population is composed of high school students, 85% of whom are Catholic, 10% of whom are Moslem or Buddhist and 5% of whom are other non-Catholics.

The faculty of the school is composed of 21 members of the Society of Jesus, 21 lay teachers who are Catholic and 5 lay teachers who are not Catholic. In the hiring of faculty, clear preference is given to members of the Society of Jesus. If such a member is not available, no particular preference is given to Catholic or non-Catholic teachers, as a commitment to teaching is considered more important.

The students are chosen (and evaluated) on what is primarily an academic standard, though other things are considered. A minimum degree of deportment and adherence to the ideals of the school is, of course, required. First preference is given to Catholic students, second preference is given to other Christian religions and to other individuals who sincerely practice whatever religion of which they may be a member.

Georgetown is approved by the Maryland State Board of Education as meeting its requirements for a secondary school. The curriculum is college preparatory. Virtually all of the graduates of the school go on to attend college, most of them attending prestigious colleges on the Eastern Seaboard. Four years of English and mathematics are required, as well as three years of social science and two years of natural science. Religious classes are required for all students for three and a half years.

The school day lasts from 8:30 a.m. to 2:45 p.m. and is divided into eight instructional periods. During the first three years, religion is taught for one period every other day. During half of the senior year, religion is taught one period per day. No religion classes are taught during the other half of the fourth year.

Religion classes are taught in such a way as not to require the non-Catholic students to violate their consciences. They remain free to disagree with the doctrines being taught, but they are required to learn the doctrines with which they disagree. The religion courses are taught from the Catholic point of view, although class discussions are held and students are free to disagree. The course content includes Catholic dogma and its roots in Judaism, discussions of the Old and New Testament and other theological books, as well as discussions of world issues.

The students are encouraged, though not required, to participate in the religious exercises which are made available, which include daily masses, retreats, occasional communion masses and breakfasts. Prayers are often said in the dormitories at night and are often said before classes. Non-Catholic students do not have to attend any religious ceremonies. Religious symbols are displayed in most, if not all, classrooms and elsewhere on the campus .

In the non-religious courses, academic freedom is practiced fully as far as teaching methodology is concerned; the restraints imposed on these courses stem primarily from the course objectives rather than any doctrine. There is an expectation, however, that all teachings conform to Catholic doctrine. Non-Catholic teachers, however, are given no special instructions in regard to teaching these "secular" subjects; they are simply expected to "give witness," by their example and bearing, of the importance of sincere striving and a moral life. The influence of the particular Catholic doctrine on the instructional methods used and the content covered in the secular subjects is virtually nil.

The school has an active athletic program and fields at least 23 different teams.

CONCLUSIONS OF LAW

The appellant contends that employees of Georgetown are employees of a "church" within the meaning of 26 U.S.C. Section 3309(b)(1)(A). This issue appears to have been settled by the decision of the Court of Appeals which stated that the Catholic private schools which are separately incorporated "must show that they satisfy both requirements of Section 3309(b)(1)(B)." 291 Md. at 766. This language clearly implies that the Catholic private schools do not meet the simpler requirements of 26 U.S.C. Section 3309(b)(1)(A). Since the appellant, however, vigorously litigated this issue, the Board will discuss it as follows.

The Supreme Court held that the word "church" means "the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing the church employees." St. Martins Evangelical Church v. South Dakota, 449 U.S. 950 (1981).

The appellant argues that the corporation is a mere formality, undergone in order to conform to the requirements of civil law. This argument misses the point. One of the requirements of the civil law, of course, is for corporate employers to pay unemployment insurance taxes to protect their employees, unless exempted by law. The question is not whether the civil law applies, but whether it provides an exemption from unemployment insurance coverage. Although the Members of the Society of Jesus are members of the congregation within the meaning of the Supreme Court's decision, the corporation formed for establishing the school is clearly not a church. Clearly, the exemption under 26 U.S.C. Section 3309(b)(1)(A) does not apply.

The real question at issue in this case is whether Georgetown meets the requirements of section, 3309(b)(1)(B). In order to meet the requirements of that section, Georgetown must show that it is, (1) an organization operated primarily for religious purposes, and (2) that it is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

It appears that Georgetown does meet the second requirement. The school is clearly operated, supervised and controlled by the Society of Jesus. The Society of Jesus has some control over the membership in the corporation. Since any Member is presumably automatically divested of his office as soon as his superiors in the Society of Jesus order him to a different assignment, it is obvious that the Society of Jesus can indirectly control membership in the corporation to some degree. Since the Members of the corporation control the school, the school is controlled by the Society of Jesus, to an extent.

The question which then arises is whether the Society of Jesus in itself is a church within the meaning of the statutes in a question. In the case of Christian School Association v. Commonwealth of Pennsylvania, 423 A.2d 1340 (1980) the Pennsylvania Commonwealth Court found than an overly restrictive view of the concept of a "church" would lead "to discrimination among religions based on the organizational structure of different religions. In that case, the court ruled that a group of parents professing a Christian religious belief were a church within the meaning of the statute, irrespective of the fact that they did not meet together for any common liturgy. A similar ruling on a different set of facts was made by the California Court of Appeals in Young Life Campaign v. Patino, 122 Cal. App. 3d 559, 176 Cal. Rptr. 23 (1981). The rulings in both these cases seem

to hinge on the rationale that, when determining whether or not an organization of individuals is a church for the purposes of determining exemption from unemployment insurance law, a liberal interpretation should be given to the word "church" in order to prevent possible discrimination among religious bodies.

The Board. finds these holdings persuasive on this particular issue.

To deny the Society of Jesus status as a church within the meaning of 26 U.S.C. Section 3309(b)(1)(B) would be to discriminate against it, and all orders of the Roman Catholic Church, on the basis of their theological organization. The Society appears to meet the Supreme Court's definition of a church. In addition, the Society as an order does, at least to some degree, supervise and control Georgetown. Georgetown is therefore operated and supervised by a church within the meaning of 26 U. SIC. Section 3309(b)(1)(B).

The Board concludes, however, that Georgetown is not operated "primarily for religious purposes."

The primary purpose of Georgetown is to run a school, to impart a secondary education recognized by the State of Maryland and colleges and universities. The formal religious classes constitute but a small part of the curriculum, smaller, it appears, than the athletic curriculum. The students do not have to be Catholic. Teachers do not have to be Catholic. Aside from formal religious courses, the moral conduct required of the students and teachers is no different from the conduct required of students and teachers at any school. Most importantly, however, is the fact that seven-eighths of the time of the teachers is spent teaching non-religious (secular) subjects designed to prepare the students for admission to the prestigious colleges of the Eastern seaboard. The question is whether the religious atmosphere, together with any restrictions on academic freedom, so permeate the life of the institution that the entire purpose of the school is primarily religious, despite the fact that seven-eighths of the classroom time and the majority of extra-curricular time is devoted to non-religious subjects. The Board concludes that it does not.

In making this determination, the Board concludes that the primary purpose of the teaching of a non-religious subject is not religious, despite the fact that the non-religious subject may be taught by a religious person, in the presence of religious symbols and even after a short introductory religious prayer.

Since the secular courses are not ostensibly religious, and since no different instructions are given to the non-Catholic teachers (who presumably are incapable of providing any type of dogmatic slant to the material by themselves) than to the Catholic teachers regarding secular subjects, the religious component of these secular courses must be infinitesimal or non-existent. Even if non-Catholic instructors have been given a general warning not to teach secular subjects in a way contrary to Catholic dogma, however, evidence would still be required that this type of warning actually made any difference. The Supreme Court, in cases dealing with statutes providing various types of public aid to private schools operated by religious groups, has dealt with the concept of what is a primarily religious purpose. In Tilden v. Richardson, 403 U.S. 672 (1971) the Court intimated that activities at primary and secondary religious schools are for the primary purpose of religion. In Board of Education v. Allen, 392 U.S. 236 (1968), however, the Court ruled that for a state to supply textbooks in secular subjects to religious schools is not an advancement of religion prohibited by the First Amendment, even where the secular textbooks were, in fact, chosen by the religious authorities. Secular textbooks, the Court reasoned, are not instrumental to the teaching of religion in private religious schools.

Ruling on an admittedly sparse record, the Court stated, in that case:

. . . we cannot agree with appellant either that all teaching in a sectarian school is religious or that the process of religious and secular training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental to the teaching of religion.

Id. at 248

Since Tildon v. Richardson dealt with the question of state aid to sectarian colleges the language intimating that all activities at primary and secondary sectarian schools is religious is essentially dicta. The Board of Education v. Allen case, directly ruling that secular textbooks supplied to primary and secondary sectarian schools do not significantly advance religion, is more persuasive.

In the instant case, the secular textbooks used in the non-religion courses are not used primarily for religious purposes. Georgetown has produced no convincing evidence of any significant religious component in the secular courses which make up seven-eighths of its curriculum. Since the secular textbooks are not significantly intertwined with religion, and since no particular religious methods are used to teach these subjects, no other conclusion is feasible.

Since the overwhelming percentage of time (and, presumably money and effort) is spent on non-religious affairs, and since whatever influence the religious ambiance may have on the whole life of the school is not sufficient to imbue the secular courses with a primarily religious character, we conclude that Georgetown is not "an organization which is operated primarily for religious purposes" within the meaning of Section 26 U.S.C. Section 3309(b)(1)(B) and Section 20(g) (7)(v)B of the Maryland Unemployment Insurance Law.

The Board is aware that a decision that the employees of Georgetown are covered by the Unemployment Insurance Law raises the spectre of excessive governmental entanglement with religion. The Board concludes, however, that this consideration is--exactly that: a spectre, something which may frighten but is basically without substance.

In the Christian School Association case, supra, the Pennsylvania Commonwealth Court listed various burdens and entanglements which Unemployment Insurance coverage may visit upon a religious body operating a school. The Board does not agree that any of these are substantial and will discuss each briefly.

First, it is not likely that payment of the tax itself would be a substantial burden on the Society of Jesus. Georgetown, with a history of stable operations since 1791, would be unlikely to have to pay more than a nominal amount of taxes or contributions. Except in the public sector, the educational field does not appear to be one in which layoffs, and the resulting unemployment taxation, play a significant factor in finances. It seems extremely unlikely that the Society of Jesus's worldwide operations, which have been conducted since 1540, would be significantly burdened by the imposition of this minimal tax.

Second, the increase in record keeping is minuscule. The Employment Security Administration basically requires quarterly wage information identical, or nearly identical, to the wage information required already by the Social Security Administration. The agency also requires separation information on separated employees. This information consists of nothing more than a half piece of paper that can be filled out by anyone with access to the records in less than three minutes. The total record-keeping burden is simply not that significant. The school has already agreed to independent annual auditing of its finances as one of the costs of being approved by the Department of Education. COMAR 13A.09.04.11 A. and B.

Third, the time spent attending hearings to determine a claimant's eligibility for unemployment benefits would also be insignificant. The record shows only 26 persons who would be covered by unemployment insurance. It is true that the janitorial and maintenance staff would add to that number. Nevertheless, a relatively small number of employees are involved. Most of these employees are carefully screened for their academic achievement and their agreement with the goals of the school before they are hired. It is hard to imagine that it would become necessary for the Society of Jesus to participate in a large number of such hearings; and, in any case, these hearings, which are locally scheduled and take an average of less than 30 minutes each, do not impose a significant potential burden on the Society of Jesus.

The more substantial issue raised by the entanglement question is whether or not eligibility hearings may come about which will require state adjudicators to rule on the validity of any single person's religious belief or on the question of what is the correct, orthodox belief of the Society of Jesus. In this regard, the Board notes that this is a situation which will rarely, if ever, occur. The standards of behavior enforced by Georgetown are clearly no more nor less than the standards of moral and conscientious behavior which any school has a right to expect of its employees.

According to the testimony, it is almost inconceivable that anyone would be fired solely on account of a sincere religious belief differing from that of the Society of Jesus. Failure in moral conduct, of course, may occur, but these failures can be adjudicated in the exact same manner that failure of moral conduct would be adjudicated in the case of a public or other non-sectarian school.

Only in the almost inconceivable case where a person whose beliefs (at first acceptable to the Society of Jesus) changed so dramatically that he felt required by conscience to actively preach against the doctrines of the Society of Jesus - only where such a person was fired would religious beliefs become an issue. Even in such an extremely unlikely case, however, the conflict can be resolved without an examination of the precise details of the religious beliefs of either party. In fact, a detailed examination of a sincere and religious belief (or change of belief) would be prohibited.

In Thomas v. Review Board of the Indiana Employment Security Division 450 U.S. 707 (1981) the Supreme Court held that a sincere religious belief prompting a voluntary quit of a job can be dealt with in the unemployment insurance context without any entanglement of the government in religious affairs and without any fact finding concerning the orthodoxy of religious beliefs. The sole governmental function is to find whether or not the asserted offending belief is sincere," a type of credibility determination made already in each and every unemployment insurance appeals case. No comparison of the individual's belief with the beliefs of the Society of Jesus would be necessary, since the issue would be sincerity, not dogma.

The case of Ursuline Academy v. Director of Division of Employment Security, 420 N.E. 2d 323 (Mass. 1981) does not persuade the Board differently. In Ursuline Academy, a school operated by a separately incorporated order of Roman Catholic nuns was held to meet the requirements of 26 U.S.C. Section 3309 (b)(1)(B). The Massachusetts court reasoned that the school was, to a great degree, supervised by and financed by the local Roman Catholic bishop, thereby meeting one test of the statute. Without any extensive further reasoning or fact finding, the court simply stated that the school was operated primarily for religious purposes. By its action, the court was actually merging the two tests of 3309(b)(1)(B) into one test. The Board of Appeals does not agree with this approach at all, as a two-part test was clearly intended by Congress.

Services performed by employees for Georgetown, therefore, are services in covered employment. Of course, since Section 20(g) (7)(v)C excludes the services of members of religious orders from coverage, their particular services for Georgetown will remain uncovered and untaxable.

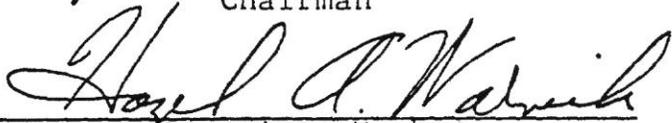
DECISION

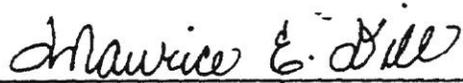
Services performed by members of the Society of Jesus for Georgetown Preparatory School are not covered employment within the meaning of Section 20(g) (7)(v)C of the Maryland Unemployment Insurance Law.

Services performed for Georgetown Preparatory School by persons who are not members of religious orders are covered employment within the meaning of Section 20(g) (7)(v)B of the Maryland Unemployment Insurance Law and 26 U.S.C. Section 3309(b)(1)(B).

The determination of the Executive Director in regard to Georgetown Preparatory School is affirmed. The previous decision of the Board, Decision No. 55-EA-79, is reversed as it applies to Georgetown Preparatory School.


Chairman


Associate Member


Associate Member

K:W:D

kmb

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